DISCUSSION OF THE SELECTION AND REMOVAL OF JUDGES[1]

RICHARD S. CHILDS, Secretary of the Short Ballot Organization:

As secretary of the Short Ballot Organization I have, of course been obliged to consider with great care the question of whether in the process of shortening the ballot and transferring minor elective offices to the appointive list, the judges also should be made appointive. The working rule which we use is this: When a given office is on the elective list, does it normally attract sufficient scrutiny to protect it from contamination? There is no question as to whether the people ought to look more sharply at these offices. The question is, after two generations of trial, *do* they look sharply enough at the candidates for these offices to compel good nominations? We know that in the case of conspicuous officers like the governor or mayor, public scrutiny compels the politician to nominate better candidates than he wants to, better candidates than he does nominate for minor offices where he has his own way.

Does it work this way with judges? I think not. I offer as a fair demonstration the case of the so-called judiciary nominators in New York city, who put a ticket of judges in the field a few years ago when the number of judges to be elected was unusually large and when such leadership as this should have been much in demand. The judiciary nominators put up a first-class ticket and practically the only votes received by their candidates were those secured through the endorsement of other parties. In spite of heavy advertising, in spite of a splendid ticket, they were unable to make a dent in the public consciousness in the matter of judicial nominations. An adverse report made by a bar association on a given nomination makes absurdly little difference in the election, and the report is forgotten in two days. My present audience, cultured and

[1] At the meeting of the Academy of Political Science, October 25, 1912.

intelligent as it is, contains only a small percentage of citizens who can name, to say nothing of describing, the judicial candidates of the several parties at the coming election. The average citizen does not know what judicial offices are to be filled or who the candidates are.

The experiment of having judges on the elective list has therefore failed, inasmuch as it has led in practise to control by professional politicians rather than control by the people. The judges, therefore, must be taken off the elective list and made appointive by the people's governor, in order to bring their selection under popular control. The average radical will froth at the mouth at this suggestion, but he is wrong and I am right,—the appointive way insures closer popular control than direct election does. Taft, Wilson and Roosevelt are all frankly in favor of the appointive rather than the elective method.

Current popular discussion regarding the judiciary makes propaganda work for an appointive judiciary seem hopeless, and the short-ballot movement is contenting itself for the present with placing emphasis on the desirability of the selection of minor administrative officers by appointment instead of election.

There are two things that can be urged, I think, as hopeful compromises. There are two classes of judges, those who are expected to legislate and those who are not. The former are considered policy-determining officers, and in the minds of many people, should be kept elective, at least until the evolution of something like the recall of decisions diminishes their policy-determining authority. There can be no argument, however, about the non-legislating judges and magistrates, and the popular opposition to putting the New York city magistrates on the elective list, as proposed by the Sullivan bill of two years ago, shows that there is a possibility of getting popular support in making this class of judges appointive and taking them out of the hands of our present ruling class, the politicians.

Another line of advance lies in the following suggestion. Let judges have a separate non-partisan column on the ballot. Impose upon the governor the duty of selecting a complete list

of judicial candidates six weeks before the election and allow three weeks after that during which counter nominations may be made by petition by such voters as find reason for dissatisfaction with the governor's nomination, all the candidates' names to appear without the party label, except that opposite the governor's selections shall be the words, "recommended by the governor." This would have all the appearance of popular election, would give the people perfectly fair opportunity to nominate and elect when they felt it necessary to correct the governor and, without taking away any of the "privilege" of direct election of judges, would bring about practically an appointive system.

EVERETT P. WHEELER, New York city: The method of judicial appointments is of great practical importance.

A lawyer in good practise who has the confidence of his clients is measurably satisfied with his position and is not going to a caucus to get a political nomination, so he stays out. On the other hand, a governor who knows his duty will search for the best men. I have had extended experience, and I know you can get first-rate lawyers to take nominations for the bench if you seek them out, but they will not go into a campaign. It is perfectly true, as the last speaker said, that the average voter pays very little attention to his judiciary ticket. Years ago when Croker was the leader of Tammany, he took offense at Joseph F. Daly, who refused to vote for apportioning judicial sales to some of Croker's friends. Croker had influence enough to prevent Daly's renomination. A few of us independents, in coöperation with the Republicans, nominated a ticket with three candidates, Mr. Daly, a Roman Catholic, Mr. Taft, the President's brother, a Protestant, and Mr. William N. Cohen, who had been on the bench temporarily, a Hebrew, and one of our very best lawyers. There was a representative ticket, a Roman Catholic, a Jew and a Protestant, all of them men of the first rank in their profession. And yet with all the campaigning we could do, and all the energy we could put into the fight, we lost that election. Had that been a matter of judicial selection there is no question that any governor would

have been disgraced to refuse to appoint these men as against those that were elected.

Then again, since we are dealing with facts, pray allow a witness to speak from personal observation. I have been practising for fifty years at the bar, about half that time in the federal and half in state courts. I say without fear of contradiction that on the whole the judges of the federal court are superior men and do more work than the judges of the state courts. I do not say there are not many men on the bench in the state courts who are the peers of the federal judges. But take them altogether they are distinctly inferior, and I think any lawyer with the same amount of experience will agree with me in this. The judges in the federal courts are appointed by the President to serve during good behavior.

So much for the method of judicial appointment. As to the judicial recall, permit me to say as a result of my endeavor to keep in touch with the plain people, that it is my belief that the great majority of the plain people have no such distrust of the judges as has been assumed. You look at a storm on the sea, and think the whole body of water is convulsed, but this is not so; it is only the surface; below the surface it is calm. The sentiment expressed and described in Mary Antin's remarkable book, *The Promised Land,* is just and true; our people love their country, are proud of their institutions, satisfied that more than any others they permit the prosperity of hard-working industrious men. These are the men for whom government is formed and they prosper under it, and it is essential that the rights of the individual should be protected against the tyranny or corruption of a temporary legislature. We have experienced that. In the old Georgia case there was offer of proof that a legislature was bribed; the court said it could not look into it, but the fact was undoubted. There have been legislatures in my time that have passed acts for money consideration. The Senate of the United States found that the legislature of Illinois was bribed to elect Lorimer. It is to guard against such abuses that our constitution provides certain limitations to the power of the legislature. For the judge to have the decision recalled is to destroy his self-

respect; he would always know that the fight would have to be made at some time in a contest involving not his moral character, but his success in a controversy. The knowledge that such a fight was imminent would be destructive of his independence. We have a remedy by impeachment for misconduct in office: in my time three judges have been impeached in this state and removed from office. I do not object at all to the suggestion that the proceedings for that purpose be facilitated. I should be willing that the bar association, for instance, should present charges; they did so, in fact, in the cases I speak of. That is what the bar association of this city was originally organized for, to present charges against these three corrupt men. We got our hearing from the legislature, though it is true we had to go to the assembly first. Within a few years another such proceeding was taken at the instance of the state bar association. These things are quite within the competence of existing societies. If a judge is accused of corruption, he should be subject to removal, and there should also be provision for removing an incompetent judge. But if you put this matter into the hands of a group of voters, who may choose to bring up an issue, not of whether the judge has done wrong, but of whether the people want to get rid of him, you destroy the judge's independence, and preclude the possibility of getting independent and first-rate men on the bench. It seems to me that the adoption of judicial recall is destructive, and I look upon the men who advocate it as I do upon the men who fired on Fort Sumter. Believe, me, friends, if this should be adopted our distinctive system of government would be broken down and the security of individual rights of person and of property would be destroyed.

CHARLES HOPKINS HARTSHORNE, Jersey City: It may be of some interest to you to know that in the adjoining state of New Jersey we have more than one system of appointing judges. None are elected except justices of the peace. The judges of one of the strongest courts in the state are neither elected, nor appointed by the governor; the judges of the court of chancery, or, as they are called, vice-chancellors, are appointed for terms

of seven years by the chancellor without any concurrent authority at all. The constitution of New Jersey provides that "the court of chancery shall consist of a chancellor," so that there may be legally no judge of that court except the chancellor; but some thirty years ago, when it was found that no one man could keep pace with the work of the court, a vice-chancellor was appointed by authority of a statute. The number has since been increased to seven. In theory, they are only referees, but in fact they exercise nearly all the functions of the chancellor, nearly all the powers of the court. The decrees of the court are signed by the chancellor in the form advised by them. No appeals lie from their decisions to the chancellor, but directly to the court of errors and appeals. The chancellor has found it necessary to select for his relief and the credit of his court the best men he could get for that office. I think, of all who have been appointed, there was only one who was not of exceptional ability, and he held office only one term. As to the judges of the other superior courts, they are all appointed by the governor for terms of seven or five years. But there has grown up a practise that has become unwritten law, that a judge of the supreme court who is satisfactory shall be reappointed, and for so long as he gives satisfaction to the bar and the public. I think there has been no case within my memory where a judge of that court has failed of reappointment except from advanced age or illness, with the result that although their terms are for only seven years, we have had judges who have served for thirty years, and few who have served less than three or four terms, and if they have left then it has been because of their own wish or because of advanced age. The result of this practise has been a very satisfactory court.

But when we come to the courts of common pleas, the county courts, the case is different. I am sorry to say appointments to them have been generally regarded as spoils of office. There has been this result, however, from the appointive system, that with one or two exceptions the judges, even of the county courts, have been entirely removed from politics. The sentiment of the state is so strong against a judge mixing in politics that by mere force of that sentiment a judge finds himself com-

pelled to withdraw from direct, and even from indirect, connection with politics. From that point of view, at least, I think the appointive system has been successful.

EDWARD D. PAGE, Oakland, N. J.: In raising the question as to whether there was widespread distrust of the courts, Mr. Wheeler injected a note of skepticism which I think it will be of value to continue, as this is one of the two points upon which the proposition of the recall of judges seems to be based. My own experience is that no such widespread distrust of the courts exists. Coming in contact with a great variety of people, both as a recorder in a New Jersey borough and in rather extensive civil litigation in the city of New York, as president of the Merchants' Protective Association, I am led to believe there is almost everywhere a most profound respect for the courts which penetrates the great inarticulate masses—the people who are not glib talkers and who rarely express their opinions in public.

The only other point on which the advocacy of this remedy seems to be founded is that it would be an education for the people to be obliged to discuss and determine for themselves the decisions of law with which they may be dissatisfied. Is it not rather a large undertaking for the people at large to gain the necessary knowledge to inform their judgment so that they may intelligently express opinions about matters such as those who advocate the recall of judges or the recall of decisions would put before them? I think most people would rather not have such a responsibility put upon them, and I think that the real reason why there is now so little interest in the election of judges is that the voters realize that they do not possess the information necessary for them to express an intelligent opinion. They are, therefore, content to leave the matter in the hands of the men who make the nominations, following them because they have better judgment as to the qualifications of a judge. I think whenever you present a question which people know is beyond their judgment they will tend to rely on someone else, and if the boss seems the handiest man, they will naturally follow him. They certainly will follow the district leader, and he is always for the "ticket."

It is a fallacy to believe that the recall is a new question. There was a democracy in Athens, where the recall of the judges prevailed. Was it not Aristides who, when the question of his recall was being voted on, sat beside the urn where the voters were casting their votes, and, asking a man who voted to ostracize him, "Do you know this Aristides?" got the answer, "No, but I am tired of hearing him called 'the Just.'" Socrates also was obliged to suffer the recall and to drink the hemlock because of the vague popular opinion against him. How can people who cannot possibly inform themselves be expected to express an opinion intelligently on such subjects? Are we ready as a democracy to present these questions to the whole body of voters? Can we trust a majority of them, no matter how much we believe in "the people," to express opinions intelligently on subjects on which they cannot be informed? Are we not going rather rapidly with political experiment when we expect the mass of the people, as in Oregon, to read and digest a book of two hundred and fifty pages before they can express an opinion on the questions at issue in a single election? Are we ready to advocate that state of affairs, and may we not, in our zeal for democracy, destroy democracy by its own excess?